RANHILL PROCESS SYSTEMS SDN BHD v. THYSSENKRUPP INDUSTRIES (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ALIZA SULAIMAN J
[ORIGINATING SUMMONS NO: WA-24C(ARB)-47-08-2021]
8 DECEMBER 2023

Abstract – *(i) In an arbitration, although a claimant may not expressly plead either a breach of the express/implied terms of a contract in the pleadings, the claimant's complaints can be gathered from its points of claim. An arbitrator who makes a finding on a breach of the terms of a contract, could not be said to have acted beyond his jurisdiction when such point is contained within the scope of the claimant's own submission; (ii) While the Arbitration Act 2005 spells out specific situations where an award made by an arbitral tribunal would be in conflict with the public policy in Malaysia, pursuant to s. 37(2), other instances might also fall under this umbrella. However, 'public policy' is a broad term. When applying it to overturn an award, the courts should interpret it narrowly and cautiously. Intervention should be sparingly used and only when a clear case is presented demonstrating that the award severely contradicts Malaysia's public policy.*

ARBITRATION: *Award – Setting aside – Application for – Application to set aside arbitration award – Delay in completion of project and works – Claim and counterclaim between parties to arbitration – Claim by claimant for additional amounts to complete works and agreed liquidated damages – Counterclaim by counterclaimant for unpaid progress claims, works carried out, return of value of performance guarantee, retention sums and assessment of damages for losses incurred – Claim allowed and counterclaim dismissed – Whether arbitrator had considered issues not pleaded – Whether arbitrator acted in excess of jurisdiction – Whether arbitrator acted in breach of rules of natural justice – Whether counterclaimant deprived of opportunity to address issues raised by arbitrator in award – Whether arbitrator failed to consider counterclaimant's main defence – Arbitration Act 2005, ss. 37(1)(a)(iv), (v), (2)(b)(i) & (ii)*

This was an application by the plaintiff to set aside the final award, save as to the quantum of costs, handed down by the arbitrator, pursuant to sub-paras. 37(1)(a)(iv), (v), (2)(b)(i) and/or (ii) of the Arbitration Act 2005 ('AA'). The facts revealed that Tanjung Bin Energy Issuer Bhd Malaysia ('Tanjung Bin') was the owner and manager of the construction of a 1,000 megawatt power station located at Tanjung Bin, Johor ('project'). Tanjung Bin appointed Alstom Services Sdn Bhd ('Alstom') to provide services, among others, for the erection and commissioning of a coal handling plant

for the project. Alstom then appointed the defendant to carry out the engineering, procurement, erection and commissioning of the said coal handling. By a letter of intent ('LOI'), the defendant appointed the plaintiff to carry out the erection and commissioning, cold trials, hot trials and PG test and substantial completion of the coal handling plant for the project ('works') at the contract price of RM24,500,000. The defendant issued a work order to the plaintiff. The materials were to be supplied by the defendant's related company based in India. After the plaintiff had mobilised to site, it alleged, among others, that there was shortage of materials received, significant delays to the erection works resulting from late delivery of the materials by the defendant, important modifications were needed to the works and delay in drawings. The delay continued on for months. The parties then commenced discussions whereby the plaintiff was prepared to agree and allow the defendant to appoint a subcontractor to carry out the works on condition that, if there were any increased costs beyond the original contract amount, such increased costs would be absorbed by the defendant. However, the plaintiff later expressed its disappointment of the descoping of activities which purportedly were not as what was agreed between the parties. The defendant proceeded to appoint new contractors to replace the plaintiff. Thereafter, the defendant alleged that the plaintiff had abandoned the works and as a result, it was entitled to recover all its costs, expenses and losses from the plaintiff. In the arbitration, the defendant claimed the sum of RM8,680,800.29 as the additional amount paid to the contractors to complete the works and agreed liquidated damages in the sum of RM2,450,000, pursuant to cl. 21.1 of the commercial terms and conditions ('commercial T&C') and the sum of RM4,900,000 pursuant to cl. 22.1 of the commercial T&C. The plaintiff counterclaimed for, among others, the sum of RM4,632,155 for unpaid progress claims, RM5,900,000 for works carried out, RM2,450,000 for the return of the value of the performance guarantee, RM800,000 for the retention sums deducted by the defendant and for an assessment of damages for losses incurred as a result of the defendant's delays and loss of profit. The arbitrator determined that: (i) the sum of RM4,065,538.67 was to be paid by the plaintiff to the defendant with interest; (ii) costs of legal representation on a party and party basis and costs of arbitration including the arbitrator's fees to be borne by the plaintiff; and (iii) the plaintiff's counterclaim was dismissed ('award'). In this application, the plaintiff relied on two main grounds to set aside the award, namely (i) the arbitrator had considered issues that were not pleaded by the defendant in the points of claim and had acted in excess of his jurisdiction when he: (a) referred to the points of claim and suggested that the defendant was relying on implied terms as the basis of its complaint when this was not the defendant's pleaded case; (b) recognised that the defendant's pleaded position was that the plaintiff had purportedly abandoned the works in September 2014 but made a finding that the abandonment took place in December 2014;

and (c) made a finding that there was an agreement reached between the parties on the issue of descoping when the plaintiff's pleaded position was otherwise and the defendant did not raise the issue of any agreement on this matter; and (ii) the arbitrator acted in breach of the rules of natural justice during the arbitral proceedings and in connection with the making of the award when he deprived the plaintiff the opportunity to address the issues which were raised by the arbitrator in the award and/or failed to consider the plaintiff's main defence in the arbitration proceedings.

Held (dismissing application):

(1) The points of claim, when read in its entirety, showed that the defendant had pleaded, among others, the contract between the parties consisting of the (i) LOI, the work order, the scope of works and the commercial T&C; (ii) the completion dates for the works; (iii) the delay by the plaintiff; and (iv) the entitlement to recoup costs, expenses and losses and to claim for liquidated damages. Whilst it was true that the words 'breach of contract' could not be found in the points of claim, nevertheless the defendant pleaded the essential ingredients for the arbitrator to identify the cause of action, which was essentially for breach of contract. The arbitrator's finding that the plaintiff had breached the implied terms of the contract in that the plaintiff failed to carry out the works regularly and diligently, fell within the terms of submission to arbitration and the award could not be said to contain matters beyond the scope of the said submission. The plaintiff had not provided proof that the award, when read and understood as a whole in depicting how the arbitrator approached the issues, came within either sub-paras. 37(1)(a)(iv) or (v) of the AA. (paras 50, 51 & 57)

(2) It was well within the jurisdiction of the arbitrator to assess the evidence and make a finding of fact on the issue as to whether the plaintiff had abandoned the works and, if so, when did this abandonment took place. There was nothing egregious on the part of the arbitrator and the plaintiff's unhappiness was essentially with the arbitrator's finding which was not in consonance with the stance taken by the plaintiff in the arbitration. (paras 65 & 66)

(3) Even though estoppel was not expressly mentioned in the defendant's pleadings in the arbitration, the arbitrator's findings on estoppel could not be faulted as it was premised on the oral and documentary evidence adduced by both parties and as analysed by the arbitrator. The arbitrator had made a finding of fact that the issue of capping the cost of descoping was neutralised by the plaintiff's conduct as it had continued to receive monies and did not make any qualifications in respect of the payments by the defendant to the plaintiff's sub-contractors. Based on the evidence as a whole, the arbitrator was inclined to conclude that the plaintiff was

more interested in leveraging itself by refusing to issue the letter of no objection and kept asking for more money rather than to finalise the descoping process expeditiously and hence, the plaintiff was estopped from arguing on the issue of the cap on the cost of descoping. (paras 76 & 77)

(4) There was nothing for the arbitrator to refer back to the parties in the course of making the award. Hence, the plaintiff's contention that the arbitrator had acted in breach of the rules of natural justice during the arbitral proceedings or in connection with the making of the award was unsubstantiated. (para 79)

(5) All of the plaintiff's contentions were substantially an appeal on the legal merits of the award, disguised and presented, as was the norm in applications of this nature, as a challenge based on an alleged breach of natural justice. The plaintiff had not fulfilled the test propounded in *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor* of there being a violation of the most basic notions of morality and justice to justify a setting aside of the award on the ground that it was in conflict with the public policy of Malaysia as the rules of natural justice had been breached. (paras 86 & 87)

Case(s) referred to:

AKN & Anor v. ALC & Ors And Other Appeals [2015] 3 SLR 488 ***(refd)***

Bennett v. White [1910] 2 KB 643 ***(refd)***

China Machine New Energy Corp v. Jaguar Energy Guatemala LLC & Anor [2020] 1 SLR 695 ***(refd)***

Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC ***(refd)***

Intraline Resources Sdn Bhd v. Exxonmobil Exploration And Production Malaysia Inc [2017] CLJU 1022; [2017] 1 LNS 1022 HC ***(refd)***

Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor [2019] 1 CLJ 1 FC ***(refd)***

Kyburn Investments Ltd v. Beca Corporate Holdings Ltd [2015] 3 NZLR 644 ***(refd)***

Magna Prima Construction Sdn Bhd v. Bina BMK Sdn Bhd & Another Case [2015] 11 MLJ 841 ***(refd)***

Master Mulia Sdn Bhd v. Sigur Rus Sdn Bhd [2020] 9 CLJ 213 FC ***(refd)***

Pancaran Prima Sdn Bhd v. Iswarabena Sdn Bhd & Another Appeal [2020] 9 CLJ 466 FC ***(refd)***

Perwira Bintang Holdings Sdn Bhd v. Kerajaan Malaysia [2013] CLJU 1336; [2013] 1 LNS 1336 HC ***(refd)***

PT Prima International Development v. Kempinski Hotels SA & Other Appeals [2012] 4 SLR 98 ***(refd)***

Read v. Brown (1888) 22 QBD 128 ***(refd)***

See Leong Chye & Anor v. United Overseas Bank Bhd & Another Appeal [2018] 10 CLJ 1 FC ***(refd)***

Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd [2018] 8 CLJ 291 CA ***(refd)***

SJIC Bina Sdn Bhd v. Iskandar Regional Development Authority [2020] CLJU 2213; [2020] 1 LNS 2213 HC ***(refd)***
Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd [2007] 3 SLR 86 ***(refd)***
TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd [2013] 4 SLR 972 ***(refd)***
Trustees Of Rotoaira Forest Trust v. Attorney-General [1999] 2 NZLR 452 ***(refd)***
Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1996] 1 CLJ 393 CA ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 8, 20, 36(1), 37(1)(a)(iv), (v), (2)(b)(i), (ii)

For the plaintiff - Sanjay Mohanasundram & Mak Kit Teng; M/s Sanjay Mohan
For the defendant - Avinash Singh Gill; M/s Avinder Gill Chambers

Reported by Lina E

JUDGMENT

Aliza Sulaiman J:

Introduction

[1] This was an application by the plaintiff to set aside the final award (save as to quantum of costs) dated 30 April 2021 by the learned arbitrator, Donatian Felix Dorairaj ('award') pursuant to sub-paras. 37(1)(a)(iv), 37(1)(a)(v), 37(2)(b)(i) and/or 37(2)(b)(ii) of the Arbitration Act 2005 ('AA 2005').

[2] The main issue which arose for consideration was whether the arbitrator had acted (i) in excess of his jurisdiction by making inferences and findings on issues that were not pleaded by the defendant; and (ii) in breach of the rules of natural justice by not affording the parties an opportunity to submit on these issues before making his determination.

[3] After due deliberation of the affidavit evidence and submissions by the parties, I dismissed the plaintiff's application with costs of RM15,000, subject to allocatur.

[4] My full reasons for the decision are set out in the subsequent part of this judgment.

The Cause Papers

[5] The cause papers in relation to the application are as follows:

(i) the plaintiff's originating summons ('OS') dated 26 August 2021 (encl. 1);

(ii) the plaintiff's affidavit in support ('AIS') affirmed by its chief executive officer, Hishamuddin bin Hanif on 26 August 2021 (encls. 2 to 4);

(iii) the plaintiff's further affidavit affirmed by the same deponent on 8 September 2021 (encl. 5);

(iv) the defendant's affidavit in reply ('AIR') affirmed by its director, Sheetal Sushil Kulkarni on 27 October 2021 (encl. 6);

(v) the defendant's AIR (1) affirmed by the same deponent on 22 November 2021 (encl. 7); and

(vi) the plaintiff's AIR affirmed by the same deponent on 6 December 2021 (encl. 8).

Background Facts

[6] The plaintiff, who was the respondent in the arbitration, has its registered address at Level 14, Wisma Perkeso, 155 Jalan Tun Razak, 50400 Kuala Lumpur.

[7] The defendant, as the claimant in the arbitration, has its registered and business address at F-2-11, 2nd Floor, Block F, Pusat Komersil Jalan Kuching, No. 115 Jalan Kepayang, Off Jalan Kuching, 51200 Kuala Lumpur.

[8] Tanjung Bin Energy Issuer Bhd Malaysia ('Tanjung Bin') is the owner and manager of the construction of a 1,000-megawatt power station located at Tanjung Bin, Johor ('project').

[9] Tanjung Bin appointed Alstom Services Sdn Bhd ('Alstom') to provide services, among others, for the erection and commissioning of a coal handling plant for the project.

[10] Alstom then appointed the defendant to carry out the engineering, procurement, erection and commissioning of the said coal handling plant.

[11] By a letter of intent dated 12 April 2013 ('LoI'), the defendant appointed the plaintiff to carry out the erection and commissioning, cold trials, hot trials and PG test and substantial completion of the coal handling plant for the project ('works') at the contract price of RM24,500,000.

[12] According to the LoI, the work to be undertaken by the plaintiff were essentially to arrange:

(i) the required cranes, tools tackles, consumables, lifting equipment and tractors/trailers for shifting of material to achieve the set targets;

(ii) sufficient number of manpower; and

(iii) the construction power supply and power supply for the contractor's office, stores and miscellaneous work.

[13] On 15 May 2013, the defendant issued a work order to the plaintiff which included Annexure I to Annexure XIII as documents that form part of the agreement.

[14] Annexure XII key dates sets out the dates on which the respective parties are to meet their contractual obligations and the sequence of work as follows:

Delivery of Material	–	Defendant
Access to site	–	Alstom/Defendant
Erection	–	Plaintiff
Commissioning	–	Plaintiff
Performance test	–	Plaintiff

[15] The materials were to be supplied by the defendant's related company based in India.

[16] After the plaintiff had mobilised to site, it alleged, among others, that there was shortage of material received, significant delays to the erection works resulting from late delivery of the materials by the defendant, important modifications needed to the works and delay in the drawings.

[17] The plaintiff asserted that delays caused to the project by the defendant continued and as at 26 April 2014, the general progress of the works was around 16.1% actual against 53.2% as planned.

[18] On 22 April 2014, the parties met to discuss the progress of the works ('meeting').

[19] The plaintiff claimed that the failure of the defendant to supply the materials to the plaintiff had a drastic and sizable impact on the manner in which the works were carried out. This resulted in a substantial increase in costs and expenses for the plaintiff.

[20] After the meeting, the plaintiff alleged that the delay continued even though the plaintiff had sent emails dated 20 May 2014, 22 May 2014 and 29 July 2014 requesting the defendant to provide the necessary materials.

[21] On 8 September 2014, the plaintiff requested monthly monetary support of RM1.1 million because it was placed in financial hardship as the milestone system invoicing penalised the plaintiff for delays that it claimed were caused by the defendant.

[22] This was followed with the plaintiff's request, on 3 October 2014, for a meeting with the defendant's board members in India to address the issues on the project, the delays and the financial issues. By 11 October 2014, the general progress was about 54.8% actual against 71.5% as planned.

[23] In mid-October 2014, the parties commenced discussions whereby the plaintiff was prepared to agree and allow the defendant to appoint a subcontractor to carry out the works on condition that, if there are any increased costs beyond the original contract amount, such increased costs will be absorbed by the defendant.

[24] However, on 15 October 2014, the plaintiff expressed its disappointment of the descoping of activities which purportedly were not as what was agreed during the meeting in India.

[25] The defendant proceeded to appoint new contractors to replace the plaintiff. Thereafter, the defendant alleged that the plaintiff had abandoned the works in November 2014 and as a result, it is entitled to recover all its costs, expenses and losses from the plaintiff.

[26] In the arbitration, the defendant claimed the sum of RM8,680,800.29 as the additional amounts paid to contractors to complete the works and agreed liquidated damages in the sum of RM2,450,000 pursuant to cl. 21.1 of the commercial terms and conditions ('commercial T&C') and the sum of RM4,900,000 pursuant to cl. 22.1 of the commercial T&C.

[27] The plaintiff counterclaimed for, among others, the sum of RM4,632,155 for unpaid progress claims, RM5,900,000 for works carried out, RM2,450,000 for return of the value of the performance guarantee, RM800,000 for the retentions sums deducted by the defendant and assessment of damages for losses incurred as a result of the defendant's delays and loss of profit.

[28] The arbitrator ultimately determined that:

(i) the sum of RM4,065,538.67 is to be paid by the plaintiff to the defendant with interest at the rate of 5% per annum from 5 November 2015 to realisation;

(ii) costs of legal representation on a party and party basis and costs of arbitration including the arbitrator's fees to be borne by the plaintiff; and

(iii) the plaintiff's counterclaim is dismissed.

The Grounds Of Application

[29] The plaintiff relied on two main grounds in its quest to set aside the award:

(i) the arbitrator acted in excess of his jurisdiction by considering issues that were not pleaded or raised by the defendant in the points of claim dated 4 July 2018. The award should be set aside pursuant to sub-paras. 37(1)(a)(iv) and/or (v) of the AA 2005; and

(ii) the arbitrator acted in breach of the rules of natural justice during the arbitral proceedings and in connection with the making of the award when he deprived the plaintiff the opportunity to address the issues which were raised by the arbitrator in the award and/or failed to consider the plaintiff's main defence in the arbitration proceedings. The award should be set aside pursuant to sub-paras. 37(2)(b)(i) and/or (ii) of the AA 2005.

The Legal Principles

[30] The relevant subparagraphs of s. 37 of the AA 2005 for purposes of the instant application are as quoted below:

Application for setting aside

37(1) An award may be set aside by the High Court only if:

(a) the party making the application provides proof that:

…

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

…

(b) the High Court finds that:

…

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where:

…

(b) a breach of the rules of natural justice occurred:

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

…

[31] An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties (see sub-s. 36(1) of the AA 2005) and cannot be challenged except on the limited grounds as set out in s. 37 of the AA 2005.

[32] Section 8 of the AA 2005 limits the intervention by the court in matters governed by the AA 2005 to strictly such matters as expressly provided in the Act itself. This is consistent with the minimalistic approach in intervention in arbitration and arbitration-related matters (see *Magna Prima Construction Sdn Bhd v. Bina BMK Sdn Bhd & Another Case* [2015] 11 MLJ 841).

[33] In deciding whether the award deals with a dispute not contemplated by or not falling within the terms or scope of submissions to arbitration and whether the award contains decision on matters beyond the scope of the submission to arbitration, I must first determine the dispute that was referred to the arbitrator by reference to the pleadings which were submitted by the parties during the arbitration. In *PT Prima International Development v. Kempinski Hotels SA & Other Appeals* [2012] 4 SLR 98, the Singapore Court of Appeal held that:

> [32] An arbitration agreement is merely an agreement between parties to submit their disputes for arbitration. The disputes submitted for arbitration determine the scope of the arbitration. It is plain that the scope of an arbitration agreement in the broad sense is not the same as the scope of the submission to arbitration. The former must encompass the latter, but the converse does not necessarily apply, in that the particular matters submitted for arbitration may not be all the matters covered by the arbitration agreement. The parties to an arbitration agreement are not obliged to submit whatever disputes they may have for arbitration. Those disputes which they choose to submit for arbitration will demarcate the jurisdiction of the arbitral tribunal in the arbitral proceedings between them. An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration. Simply put, a party cannot raise a new dispute in an arbitration without the consent of the other party. These propositions flow inexorably from the consensual nature of arbitration.
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> [33] The role of pleadings in arbitral proceedings is to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator's adjudication. …

[34] Closer to home, the High Court in *Perwira Bintang Holdings Sdn Bhd v. Kerajaan Malaysia* [2013] CLJU 1336; [2013] 1 LNS 1336; [2014] 11 MLJ 561 found that:

> [82] From the facts and circumstances in this arbitration, it was quite apparent that the final award involved a 'new difference or such matters which would have been irrelevant to the issues requiring determination' by the learned arbitrator. The 'new difference' being the matter of length or quantity of hard rock which was irrelevant to the issue of entitlement to the extra-over claims because there was no dispute on this as seen from the documentation and conduct of the parties, especially the defendant.

> [83] The submissions of the parties, again, of the defendant, are also insightful and they support the above conclusions. From the submissions, it is quite obvious that the matter of the quantum as understood by the learned arbitrator was not of concern at all to the parties; especially to the defendant …
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> (the decision of the High Court was affirmed by the Court of Appeal; see *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617).

[35] The burden lies on the plaintiff to prove, on a balance of probabilities, that there is a "new difference" which was not relevant to the determination of the dispute, and it was not an issue in dispute between the parties. In determining whether there is a "new difference", the parties' pleadings and submissions during the course of the arbitration are relevant considerations.

[36] Although the plaintiff did not cite sub-para. 37(1)(b)(ii) of the AA 2005 in the OS, it is well accepted that a party who is applying to set aside an award pursuant to sub-paras. 37(2)(b)(i) or (ii) of the AA 2005 is in fact claiming that the award is in conflict with the public policy of Malaysia. Subparagraphs 37(2)(b)(i) and (ii) of the AA 2005 are not stand-alone provisions as the words "Without limiting the generality of subpara. (1)(b)(ii)" shows. In *Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor* [2019] 1 CLJ 1, the Federal Court said:

> [55] Section 37(2)(b)(ii) of the AA 2005 provides that an award made by an arbitral tribunal would be in conflict with the public policy of Malaysia if a breach of the rules of natural justice occurred in connection with the making of the award. The circumstances stated in s. 37(2) are by no means exhaustive. Other appropriate circumstances may also fall under the category of "public policy" in view of the opening phrase "without limiting the generality of sub-para. (1)(b)(ii) as appears in s. 37(2) of the AA 2005. However, it must be appreciated that the concept of public policy generally is itself a broad concept. But in applying the concept for the purpose of setting aside an award under s. 37 of the AA 2005, the concept of public policy ought to be read narrowly and more restrictively. The court's intervention should be sparingly used. The court must be compelled that a strong case has been made out that the arbitral award conflicts with the public policy of Malaysia. As clearly stated by the Court of Appeal in *Sigur Ros* (with which we agree): "The concept of public policy must be one taken in the higher sense where some fundamental principle of law or justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process or powers will be abused."

[37] Section 20 the AA 2005 provides that "The parties shall be treated with equality and each party shall be given a fair and reasonable opportunity of presenting that party's case.".

[38] In the judgment of this court in *SJIC Bina Sdn Bhd v. Iskandar Regional Development Authority* [2020] CLJU 2213; [2020] 1 LNS 2213 (the decision was affirmed by the Court of Appeal on 20 January 2022), the legal principles that can be distilled from *Jan De Nul*'s case were summarised in para. 47 as follows:

(a) the concept of public policy generally is itself a broad concept and the term "public policy" is commonly used to signify some matter which concerns public good and public interest;

(b) the term "public policy" in subpara. 37(1)(b)(ii) AA 2005 covers a scope of public policy elements as used generally but in subpara. 37(2)(b)(ii), the scope is more specific since it categorises a breach of the rules of natural justice which occurred in connection with the making of an award as being in conflict with the public policy of Malaysia;

(c) in applying the concept of public policy for the purpose of setting aside an award under s. 37 AA 2005, the concept of public policy ought to be read narrowly, more restrictively and taken in the higher sense where some fundamental principle of law or justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process or powers will be abused;

(d) the public policy ground for setting aside an arbitral award could be invoked where a violation of the most basic and fundamental notions or principles of morality and justice is proven. It covers fundamental principles of law and justice in both substantive and procedural aspects;

(e) instances such as "patent injustice", "manifestly unlawful and unconscionable", "substantial injustice", "serious irregularity" and other similar flaws in the arbitral process and award would fall within the applicable concept of public policy but these do not mean injustice which is more than *de minimis*. What is required is that the injustice had real effect and had prejudiced the basic rights of the applicant and where the upholding of the arbitral award would shock the conscience, be clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public;

(f) the circumstances stated in sub-s. 37(2) AA 2005 are not exhaustive and other appropriate situations may also fall under the category of "public policy" in view of the opening phrase "without limiting the generality of subpara. (1)(b)(ii)" as appears in sub-s. 37(2); and

(g) the court's intervention should be sparingly used. The court must be compelled that a strong case has been made out that the arbitral award conflicts with the public policy of Malaysia before an order can be made to set aside the award.

[39] In yet another illuminating decision in *Master Mulia Sdn Bhd v. Sigur Rus Sdn Bhd* [2020] 9 CLJ 213; [2020] 6 MLRA 51, the Federal Court held that:

> [53] In the light of the above, we think that the guiding principles on the exercise of residual discretion when an application for setting aside an award is grounded on breach of natural justice may be stated as follows:
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> > First, the court must consider: (a) which rule of natural justice was breached; (b) how it was breached; and (c) in what way the breach was connected to the making of the award;
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> > Second, the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding;
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> > Third, if the breach is relatively immaterial or was not likely to have affected the outcome, discretion will be refused;
> >
> > Fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and that the arbitral tribunal would not have reached a different conclusion the court may refuse to set aside the award;
> >
> > Fifth, where the breach is significant and might have affected the outcome, the award may be set aside;
> >
> > Sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award;
> >
> > Seventh, the discretion given the court was intended to confer a wide discretion dependent on the nature of the breach and its impact. …
> >
> > …

(see too, *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR 86, *TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972, *AKN & Another v. ALC & Others And Other Appeals* [2015] 3 SLR 488 and *Intraline Resources Sdn Bhd v. Exxonmobil Exploration And Production Malaysia Inc* [2017] CLJU 1022; [2017] 1 LNS 1022).

[40] In the context of an application grounded on sub-para. 37(1)(b)(ii) read with sub-para. 37(2)(b)(ii) of the AA 2005, even though the court may find that a breach of the rules on natural justice has been established or that an arbitral award is in conflict with the public policy under s. 37 of the AA 2005, it does not necessarily mean that the award must be set aside as a matter of course. The power of the court to set aside the award is discretionary and will not be exercised automatically in every case where the complaints are established (see para. 56 in *Jan De Nul*'s case (*supra*, at p. 429 citing *Kyburn Investments Ltd v. Beca Corporate Holdings Ltd* [2015] 3 NZLR 644 and *Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd* [2018] 8 CLJ 291).

[41] In *Pancaran Prima Sdn Bhd v. Iswarabena Sdn Bhd & Another Appeal* [2020] 9 CLJ 466; [2020] 6 MLRA 124, the apex court further elucidated that:

> [139] Like any other exercise of discretion, the discretion to set aside an award for breach of the rules of natural justice must be exercised judiciously and only when it is just to do so. The authorities are clear that in considering whether the discretion should be exercised, the court must undertake an evaluation of relevant factors such as those identified in *Kyburn*, amongst which would be the seriousness, magnitude or materiality of the breach, its nature and its impact, whether the breach would have any effect on the outcome of the arbitration and leaving room for 'casual breach or occasional error'. Costs of rehearing and delay in raising the complaint are further relevant factors to be taken into account in the evaluation process.
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> [140] *Kyburn* explained the position in the following terms: "... a finding of a breach of the rules of natural justice does not mean that the arbitral award must be set aside, that the power of the court to set aside an award is discretionary and will not be exercised automatically in every case. The discretion enables the court to evaluate the nature and impact of the particular breach in deciding whether the award should be set aside, the policy of encouraging arbitral finality will dissuade the court from exercising discretion when the breach is relatively immaterial or was not likely to have affected the outcome".
>
> [141] The "very low" threshold for s. 37 as decided in *Petronas Penapisan* and *Sigur Ros* must be understood in the context it was made, *ie*, that compared to s. 42, the threshold under s. 37 is "very low". In other words, it is "very low" relative to the threshold under s. 42. It must be remembered that the grounds enumerated in s. 37 are exhaustive and as such the court cannot set aside an award for reasons other than those that are listed.
>
> [142] The grounds enumerated in s. 37 need to be construed narrowly as they represent exceptions to the finality of arbitration awards (s. 36). This is to avoid devaluing the arbitration agreement that arbitral awards are final and binding and also to preserve the autonomy of the forum selected by the parties by minimising judicial interference in arbitral awards: *Jan De Nul* (*supra*).
>
> [143] This narrow and restrictive definition is important in terms of the public policy ground which this court in *Jan De Nul* interpreted as only encompassing violations of the "most basic notions of morality and justice or such violations that offend the fundamental principle of law and justice, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the Court's process and powers will thereby be abused". What is required is that the injustice had real effect and had prejudiced the basic rights of the applicant. We do not find this to be the case in the present appeals.

(see too, para. 109 of the judgment where the court held that even if the arbitrator was wrong in not giving the parties the opportunity to submit, the breach must be such gravity and materiality that the party can be said to have been denied due process).

[42] In the case which was referred to by the plaintiff, *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC & Another* [2020] 1 SLR 695 at p. 728, the Singapore Court of Appeal held that "… in determining whether a party had been denied his right to a fair hearing by the tribunal's conduct of the proceedings, the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done. This inquiry will necessarily be a fact-sensitive one, and much will depend on the precise circumstances of each case …".

[43] Guided by the abovesaid legal principles, I shall now proceed to examine the plaintiff's grounds in support of its application.

First Ground: Whether The Award Should Be Set Aside Pursuant To Sub-paras. 37(1)(a)(iv) And/ Or (v) Of The AA 2005 As The Arbitrator Had Acted In Excess Of His Jurisdiction By Considering Issues That Were Not Pleaded Or Raised By The Defendant

[44] The plaintiff submitted three instances where the arbitrator had considered issues which are not part of the defendant's pleaded case. Each of the alleged occurrences is discussed below.

(i) The Arbitrator Referred To The Points Of Claim And Suggested That The Defendant Was Relying On Implied Terms As The Basis Of Its Complaint When This Was Not The Defendant's Pleaded Case

[45] The arbitrator identified two fundamental issues, mainly whether there was a breach of the contract and if there was, which party was in default. To the arbitrator, the issues as suggested by the parties in their respective submissions are ancillary to the fundamental issues.

[46] In relation to the issue as to whether there was a breach of the contract, the plaintiff averred that the points of claim do not specifically refer to any particular breach by the plaintiff but rather it is broadly alleged that there was substantial delay by the plaintiff. It was further averred that, in paras. 71, 75, 80 and 81 of the award, the arbitrator suggested that, although the defendant did not plead any implied term, the defendant was nonetheless relying on the implied terms as the basis of its complaint. Hence, the arbitrator had considered issues that were not pleaded by the defendant in the points of claim and had acted in excess of his jurisdiction (see paras. 68 and 69, AIS).

[47] The plaintiff asserted that it is wrong for the arbitrator to assume that such terms are to be implied into the contract without it being pleaded, and no matter how common its usage may be in a particular industry, as there is a process to determine whether a term can be implied into a contract, and this could potentially be a matter of significant dispute. In this regard, the plaintiff relied on the decision of the Federal Court in *See Leong Chye & Anor v. United Overseas Bank Bhd & Another Appeal* [2018] 10 CLJ 1; [2019] 1 MLJ 25 which had elucidated on the types of implied terms in these words:

> [74] The law on implied terms has been succinctly summarised in the case of *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 MLJ 151 which was also extensively cited in the Court of Appeal judgment. The relevant paragraphs in *Sababumi*'s case at pp 169-170 are reproduced as follows:
>
> > Implied terms are of three types. The first and most important type is an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contract. The implied term contended for in this appeal belongs to this type and much more about this later.
> >
> > The second type of implied term is one by operation of law, and not based on the inference just explained. By operation of law, I mean that a large number of specific implied terms have been held in to arise from previous decided cases on certain specific facts. Such *ratio decidendi* in respect of such decided implied terms are normally adopted by courts in subsequent cases on similar facts as a matter of course without the necessity of any court to decide afresh whether it ought to draw the inference as explained above. Thus, such implied terms come from decided cases exclusively. Thus, in a contract of employment, there is an implied term that the employee will serve his employer faithfully, and not to act against the employer's interest, and again there is another implied term that the employer will provide a safe system of work. Many of such decided and specific implied terms have been incorporated into statutes such as the Sale of Goods Act 1957 and others; it is not necessary to discuss it further except to emphasise that such an implied term of this particular type may sometimes be excluded by parties by an agreement to the contrary and more importantly, it is not dependent on the court having to draw an inference explained above.
> >
> > The third kind of an implied term is one that is implied by custom or usage of any market or trade which is reasonable, and again it is not dependent on a court's inference explained above but by virtue of such a custom or usage from the market or trade. Interestingly, s. 92(e) of the Evidence Act 1950 seems

> to be custom-made to prove logistical support for this particular type of implied term. It will be remembered that s. 92(e) aforesaid is one of the exceptions to the rule against evidence to contradict or vary any terms of a written contract.
>
> …

[48] Mr Sanjay Mohan submitted for the plaintiff that in so far as the third category of implied terms is concerned, evidence must be led to establish that usage or custom was such to imply such a term, but this was not done by the defendant in the arbitration proceedings.

[49] It was further submitted that the finding by the arbitrator on the issue of implied terms has grave consequences as the arbitrator ultimately went on to find, in para. 109 of the award, that the plaintiff was in delay and therefore in breach of the contract and the damages sought by the defendant was then assessed.

[50] I shall begin the analysis with the points of claim. I find that the points of claim, when read in its entirety, shows that the defendant had pleaded, among others, the contract between the parties consisting of the LoI, the work order, the scope of works and the commercial T&C; the completion dates for the works; the delay by the plaintiff; and the entitlement to recoup costs, expenses and losses and to claim for liquidated damages.

[51] Whilst it is true that the words "breach of contract" cannot be found in the points of claim, nevertheless the defendant had pleaded the essential ingredients for the arbitrator to identify the cause of action, which was essentially for breach of contract. A cause of action is the entire set of facts that gives rise to an enforceable claim (per Esher MR in *Read v. Brown* (1888) 22 QBD 128 and applied in *Bennett v. White* [1910] 2 KB 643 and referred to in *Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1996] 1 CLJ 393 at p. 409).

[52] At the arbitration, the plaintiff did not make any submission as to the absence of the words "breach of contract" in the defendant's pleadings. Instead, in sub-para. 24(b) of the written submissions (post-hearing), the plaintiff itself suggested that one of the main issues to be tried is "Whether the claimant breached the terms of the contract between the parties in failing to provide the material and access to site to enable the respondent to carry out the erection and commissioning works and the consequences of such a failure?". This was recognised by the arbitrator in sub-para. 68(b)(ii) of the award.

[53] Moving on to the points of defence and amended counterclaim dated 31 August 2018, the plaintiff's pleaded position was that the defendant was in breach of its express and/or implied terms of the contract when the defendant failed to, among others, provide adequate material to the plaintiff,

make prompt payments, and properly administer the contract. This is evident from paras. 21, 24 and 37 of the points of defence. In this sense, the arbitrator correctly observed in para. 72 of the award that "The respondent in its defence and amended counterclaim is more explicit".

[54] Pertinently, and as submitted by the defendant's counsel, nowhere in the points of defence and written submissions did the plaintiff contended that the defendant did not plead breach of contract in the points of claim and as such, none of the defendant's witnesses were cross-examined on this point. It was only in the instant application that the plaintiff attempted to persuade this court to set aside the award on the ground that the arbitrator had decided on a "new difference" which was not relevant to the determination of the dispute and was not an issue in dispute between the parties.

[55] Although in the AIS, the plaintiff had highlighted paras. 71, 75, 80 and 81 of the award, the decision on whether the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration and/or the award contains decisions on matters beyond the scope of the submission to arbitration entails a reading of the entire section in the award on the issue of whether there was a breach of the contract *ie*, from paras. 71 to 82.

[56] Having read the said paragraphs, suffice for present purposes to reproduce the following passages from the award to accentuate the findings and conclusions of the arbitrator:

> 77. Although the Claimant does not refer specifically to breach or breaches of contract by the Respondent, it is fairly obvious that a reading of pleadings and submission that the Claimant alleges that there was substantial delay by the Respondent in meeting with the contractual key dates and as well as recovery plan. This in essence was the breach.
>
> …
>
> 80. As there is no express provision in the contract for either the Respondent to carry out the works regularly and diligently neither is any express provision for the Claimant to provide timely access to work fronts and/or supply of materials, it is however trite law that these obligations are implied in any engineering or building contracts.
>
> 81. *I thus find that although the Claimant has not expressly pleaded either a breach of the express terms of the contract or an implied term from the pleadings it is fairly clear that the Claimant's complaint as can be gathered from its Points of Claim is that the Respondent was in breach of the implied terms of the contract in that it failed to carry out the works regularly and diligently.* (emphasis added)

[57] In my considered view, the arbitrator's finding that the plaintiff had breached the implied terms of the contract in that the plaintiff failed to carry out the works regularly and diligently fell within the terms of submission to arbitration and the award cannot be said to contain matters beyond the scope of the said submission. The plaintiff has not provided proof that the award, when read and understood as a whole in depicting how the arbitrator approached the issues, comes within either sub-paras. 37(1)(a)(iv) or (v) of the AA 2005.

(ii) The Arbitrator Recognised That The Defendant's Pleaded Position Was That The Plaintiff Had Purportedly Abandoned The Works In September 2014, But He Made A Finding That The Abandonment Took Place In December 2014

[58] In paras. 14 and 15 of the points of claim, the defendant pleaded that, upon commencing the works, the plaintiff had periodically issued invoices and in respect of Invoice Nos. 17, 18 and 1A/W, the defendant refused to make payment on the ground, among others, that the plaintiff stopped partial work sometime in May 2014 and abandoned the works sometime in September 2014 without assigning any reasons whatsoever. The arbitrator acknowledged this pleading in para. 111 of the award.

[59] The plaintiff's grouse was with para. 112 of the award where the arbitrator went on to find that "There was no evidence adduced by the claimant to support this allegation in the pleading. In fact, if at all there was abandonment, it was in December 2014, as evidenced by the email on 27 December 2014 at RBD/1A/9." Again, the plaintiff argued that, in doing so, the arbitrator had considered matters that were not pleaded, and this impacted on the overall award.

[60] However, the plaintiff has conveniently omitted to mention the subsequent pleadings by the respective parties on the issue of abandonment.

[61] Basically, the plaintiff denied the defendant's assertions that the plaintiff had abandoned the works and the defendant was put to strict proof. Specifically, in sub-para. 31(i) of the points of defence, it was pleaded that the plaintiff did not abandon the site, and in any event, the defendant had removed the works from the plaintiff and gave these to the defendant's subcontractors. The plaintiff elaborated with more facts and repeated its denial that it had abandoned the works in paras. 32 and 41, respectively, in the points of defence.

[62] The defendant then retorted in the amended reply that the plaintiff had pre-planned the move to abandon the works and had in fact abandoned the site. This occurred soon after it was intimated that some of the plaintiff's works were to be descoped. Specific replies to para. 32 of the points of defence were also provided (see paras. 41 and 43 to 47 of the amended reply).

[63] In para. 68 of the award, the arbitrator acknowledged that, in the submissions of the parties, they had suggested one of the issues for determination was "whether the claimant is entitled for the additional cost incurred by it for carrying out the de-scoped and abandoned works of the respondent".

[64] In para. 135 of the award, the arbitrator reiterated that "The evidence also shows that the respondent abandoned the work that was not descoped as the claimant took over the same on 22 December 2014 as confirmed by its email of even date (RBD/V1A/9) & I so hold."

[65] In the light of the pleaded case of the parties and their submissions before the arbitral tribunal, it was well within the jurisdiction of the arbitrator to assess the evidence and make a finding of fact on the issue as to whether the plaintiff had abandoned the works, and if so, when did this abandonment take place. The arbitrator found that "contrary to what is alleged in the claimant's pleadings, the evidence suggests there was descoping followed by abandonment of the remaining works." And "Although the claimant has not specifically pleaded for losses arising from descoping and sought only to rely on abandonment, the evidence adduced during the evidence taking stage compels me to deal with the issue of descoping of the respondent's works and its validity thereof." (See paras. 113 and 118 of the award). The arbitrator then proceeded to discuss the issue of "Descoping of Works" in paras. 119 to 145 of the award in detail.

[66] In the final analysis, I am of the view that there is nothing egregious on the part of the arbitrator and the plaintiff's unhappiness was essentially with the arbitrator's finding which was not in consonance with the stance taken by the plaintiff in the arbitration.

[67] Akin to first ground (i), I am not persuaded that the plaintiff has discharged the burden of proving that the award should be set aside pursuant to sub-paras. 37(1)(a)(iv) and/or (v) of the AA 2005.

(iii) The Arbitrator Made A Finding That There Was An Agreement Reached Between The Parties On The Issue Of Descoping When The Plaintiff's Pleaded Position Was Otherwise And The Defendant Did Not Raise The Issue Of Any Agreement On This Matter

[68] Continuing with what was previously stated in para. 58 of this judgment, the defendant had pleaded that it had issued a letter dated 7 November 2014 to the plaintiff wherein a detailed and revised scope of works and responsibilities were issued to the plaintiff. This was done to allow the plaintiff to resume the work diligently and efficiently. However, despite giving several opportunities to the plaintiff, the plaintiff was still unable to perform the reduced scope of works and this resulted in the works being removed and other contractors were appointed to handle the same (see sub-paras. 15(d) and (e) of the points of claim).

[69] In the points of defence, the plaintiff pleaded that it had responded to the defendant's letter dated 7 November 2014 and that "… the claimant's decision to appoint the respondent's subcontractor directly without having a clear agreement as to the subcontractor's scope of work amounts to interference with the respondent's contractual rights and a breach of the express and/or implied terms of the subcontract …". A B

[70] The defendant, in the amended reply, did not allege that an agreement was reached between the parties on the issue of descoping (see paras. 49 to 55). Instead, the defendant stated in para. 55, among others, that "… The respondent was neither agreeing to descoping nor was it allowing the claimant to go ahead with the mitigation plan and was causing hindrance to the works at site, thereby causing harm and nuisance to the end customers, Alstom and Malakoff, who instructed the claimant to terminate the services of the respondent. But still, the claimant had nevertheless provided ample time to the respondent to recoup, but unfortunately, as admitted by the respondent, they chose abandonment as an option to avoid the losses, thereby putting the claimant at a huge risks and loss in the project." C D

[71] In the award, the arbitrator traced the narrative regarding descoping based on the documents and tested the same against the oral evidence at the hearing (see paras. 119 to 130 of the award). The arbitrator referred to the parties' submissions as follows: E

> 131. In its written submission, the Respondent reiterated its position that the descoping was never agreed by the Respondent and despite non-agreement the Claimant proceeded to descope and later took over the Respondent's works. As such, the Claimant was in breach of the contract in that it prevented the Claimant from completing its work and as such it was deprived of the profit that it would have derived in carrying out and completing the works. It is therefore claims 10% of the contract sum. F
>
> 132. The Claimant on the other hand in its written submission was of the view that the Respondent had agreed to the descoping as the Claimant had already made additional payments to the Respondent. In addition the Claimant had given details of descoping. Thus it was an afterthought by the Respondent to convey that there was misunderstanding while accepting descoping the work., G

before concluding that: H

> 133. Having analysed the oral and documentary evidence and written submission and bearing in mind that the contract does not provide for descoping. I find that on the balance of probabilities the Respondent had consented to the descoping of its works. I make this finding on the basis of the evidence of RW2 at cross examination and re-examination which I have cited at paragraphs 128, 129, 130 and 131. I

A 134. I note RW2's evidence of agreement was subject to a clear demarcation being drawn up as to the works that were to be descoped and the works remained to be done by the Respondent. The evidence shows that this was eventually agreed.

[72] The plaintiff's grievance was that the defendant's position in its B submission before the arbitral tribunal was inconsistent with its pleadings. The defendant did not plead that there was an agreement between the parties for the plaintiff to compensate the defendant for the increased costs of completing the works. The arbitrator nevertheless made a finding that there was such an agreement and went on to award damages to the defendant on C this basis.

[73] Upon close scrutiny of the parties' pleadings, the fact that the defendant had issued a letter dated 7 November 2014 on the revised scope of works or descoping of the plaintiff's works was raised in the pleadings (see, among others, sub-paras. 15(d) and (e) in the points of claim; para. 34 in the D defence; paras. 19, 20, 41, 49 to 51 and 54 in the amended reply; and para. 5 in the reply to amended defence to counterclaim).

[74] Evidence was also adduced on this matter and the arbitrator had dutifully considered the same together with the written submissions by the parties (refer paras. 118 to 145 of the final award). The arbitrator ultimately E made a finding of fact, based on the evidence, that there was an agreement to descope but not that the cost of descoping is capped at RM24.5 million. In the circumstances, the plaintiff's ground of challenge that the arbitrator acted in excess of jurisdiction and that the award should be set aside pursuant to sub-paras. 37(1)(a)(iv) and/or (v) of the AA 2005 is simply unfounded.

F **[75]** Before I proceed to the second ground, and for the sake of completeness, the plaintiff also took issue with the findings of the arbitrator that there was no agreement between the parties for the costs of descoping not to exceed RM24.5 million on the ground that there is estoppel on the part of the plaintiff. The plaintiff asserted that the issue of estoppel was not raised G in the defendant's pleadings. However, the arbitrator reasoned that, between the period when the letter dated 7 November 2014 was issued until 20 November 2014, the plaintiff had received monies and payments were also made to the plaintiff's subcontractors without any qualifications by the plaintiff (see sub-para. 145(ii) of the award).

H **[76]** In my considered view, even though estoppel was not expressly mentioned in the defendant's pleadings in the arbitration, the arbitrator's findings on estoppel cannot be faulted as it was premised on the oral and documentary evidence adduced by both parties and as analysed by the arbitrator (see paras. 119 to 145 of the award). I agree with the defendant's I submission that the arbitrator had made a finding of fact that the issue of

capping the cost of descoping was neutralised by the plaintiff's conduct as it had continued to receive monies and did not make any qualifications in respect of the payments by the defendant to the plaintiff's subcontractors.

[77] Based on the evidence as a whole, including by RW2 when cross-examined, the arbitrator was inclined to conclude that the plaintiff was more interested in leveraging itself by refusing to issue the letter of no objection and kept asking for more money rather than to finalise the descoping process expeditiously, and hence the plaintiff was estopped from arguing on the issue of the cap on the cost of descoping.

Second Ground: Whether The Award Should Be Set Aside Pursuant To Sub-paras. 37(2)(b)(i) And/ Or (ii) Of The AA 2005 As The Arbitrator Had Acted In Breach Of The Rules Of Natural Justice During The Arbitral Proceedings Or In Connection With The Making Of The Award When He:

(i) considered issues that were not pleaded by the defendant; and/or

(ii) failed to consider the plaintiff's main defence in the arbitration proceedings

[78] With regards to second ground (i) above, apart from the submissions which have been canvassed under first ground (i), the plaintiff additionally affirmed that the arbitrator has acted in breach of the rules of natural justice because, if the arbitrator intends to draw any inference on matters not raised by either party, he should have given the parties an opportunity to address the same (see para. 72, AIS). Had the arbitrator done that, the plaintiff would have drawn his attention to the decision of the Federal Court in *Damansara Realty Sdn Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257; [2011] 6 MLJ 464 which held that the facts which result had in the inference of an implied term need to be pleaded whereas in the present case, no such facts were pleaded to justify the arbitrator reaching his conclusion at para. 80 of the award.

[79] In view of my findings in relation to second ground (i) as addressed earlier, there was nothing for the arbitrator to refer back to the parties in the course of making the award. Hence, the plaintiff's contention that the arbitrator had acted in breach of the rules of natural justice during the arbitral proceedings or in connection with the making of the award is unsubstantiated.

[80] Proceeding next to second ground (ii) above, Mr Sanjay Mohan submitted for the plaintiff that the arbitrator had breached the rules of natural justice in connection with the making of the award as he failed to consider the plaintiff's defence that descoping was never agreed by the parties and nor was the monetary value of the descoped works.

[81] The award was attacked for several reasons, among others, that:

(i) the arbitrator failed to consider that the defendant is not entitled to recover the difference between the contract value and the costs it actually incurred to complete the balance works and that the sub-contractors engaged by the defendant were essentially the sub-contractors of the plaintiff, therefore, there should be no additional costs incurred or these are not recoverable from the plaintiff;

(ii) the arbitrator failed to appreciate that the plaintiff should be paid for the works it had carried out and that the defendant benefitted from the works carried out by the plaintiff without being paid;

(iii) the arbitrator's reasoning is flawed because the parties had not agreed for the descoping of the defendant's works, the contract is a fixed sum contract and the damages incurred by the defendant for engaging subcontractors are already reflected in the agreed contract sum; and

(iv) the arbitrator decided the defendant had failed to prove its claim and yet, he proceeded to award damages to the defendant on the basis that the plaintiff did not cross-examine the defendant's witnesses on the issue of damages. As for the damages awarded, learned counsel argued, among others, that this was not based on the defendant's pleaded case, there is no evidence of the need to carry out any rectification works, the value of the omitted works has not been assessed and there is no evidence to support the defendant's claim of RM8.68 million increased costs.

[82] With regards to sub-para. 81(iv) above, a perusal of the points of claim and the award shows that the plaintiff has mischaracterised the arbitrator's findings.

[83] Firstly, at para. 154 of the award, the arbitrator had no hesitation in finding that the defendant "… has **not fully made out** its claim for damages of RM24,998,525.30 …" (emphasis added) as particularised in the table in para. 17 of the points of claim, which runs to almost three pages long. After giving his reasons for this decision, the arbitrator set out the items for which he had rejected in para. 155 of the award, amounting to RM4,615,261.62, before stating that:

> 156. Having come to the above conclusion, I have no hesitation in accepting **the other particulars** of contractors and work carried out in the tables at pages 12, 13 and 14 of the Points of Claim as they were not subject to examination by the Respondent's counsel & therefore deemed to have accepted the same. … (emphasis added)

and concluding the total additional cost incurred was RM20,383,563.68. Clearly, the arbitrator did not decide that the defendant had failed to prove its claim in its entirety as was submitted to this court.

[84] Secondly, as to the arbitrator's decision on the award of damages, after having read the section of the award on "Damages" from paras. 146 to 162, the arbitrator has evidently considered the oral and documentary evidence in assessing the matter at hand. He is not bound to "slavishly adopt the position advocated by one party or the other" (see *Trustees Of Rotoaira Forest Trust v. Attorney-General* [1999] 2 NZLR 452 at p. 463).

[85] In examining the challenge against the award on the ground of breach of the rules of natural justice, I was guided by the legal principles as alluded to in the earlier part of this judgment and I have, as advocated by learned counsel for the defendant, assessed the plaintiff's application based on its own facts and premised upon the pleadings, all the evidence which was unfolded during the arbitration hearing, including the re-examination of CW2, and the award read as a whole.

[86] In the final analysis, all of the plaintiff's contentions are substantially an appeal on the legal merits of the award, disguised and presented, as is the norm in applications of this nature, as a challenge based on an alleged breach of natural justice.

[87] In the upshot, the plaintiff has not fulfilled the *Jan De Nul*'s test of there being a violation of the most basic notions of morality and justice to justify a setting aside of the award on the ground that it is in conflict with the public policy of Malaysia as the rules of natural justice have been breached.

Conclusion

[88] Based on all the aforesaid reasons, the plaintiff's application was dismissed with costs of RM15,000, as suggested by the plaintiff's counsel and accepted by the defendant's counsel, subject to allocatur.